U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 27 2006

SRC 04 222 53151

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the arts, science or business. The petitioner seeks employment as a senior electrical design engineer at Transocean Offshore Deepwater Drilling Company. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner has not established that he qualifies for classification as an alien of exceptional ability, or that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. We note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor.

In denying the petition, the director discussed the evidence submitted in support of the petitioner's claim of exceptional ability, and stated: "The self-petitioner has failed to distinguish himself as an alien of exceptional ability." Counsel, on appeal, protests that the director "did not accurately evaluate the evidence presented with the submission and give it the appropriate weight." We concur with counsel's assertion. For instance, the director found that the petitioner's status as a senior member of the Institute of Electrical and Electronics Engineers (IEEE) fails to satisfy 8 C.F.R. § 204.5(k)(3)(ii)(E), which relates to membership in professional associations. The director, however, acknowledged materials in the record, which show that only 8% of IEEE members qualify for senior member status (which is "the highest [grade] for which application may be

made"). This information is consistent with a finding that a grade of senior member reflects a degree of expertise significantly above that ordinarily encountered among electrical engineers.

The director's unfavorable finding regarding the petitioner's claim of exceptional ability appears to rest on a superficial reading of the evidence.

Regarding the other element of the petition, specifically the petitioner's application for a national interest waiver of the job offer requirement, the director offered only two sentences of substantive discussion of the evidence:

> The self-petitioner responded [to a notice of intent to deny] with a written personal statement and letters stating that the application process should be approved to allow the self-petitioner to change jobs. Aside from a copy of his doctoral degree certificate, no other significant evidence articulating how the proposed benefit would be national in scope or how the national interest would be adversely affected if a labor certificate were required for the alien was submitted.

On appeal, counsel states:

> The examining officer did not accurately evaluate the evidence presented with the submission and give it the appropriate weight. Moreover, the officer does not seem to have actually read or paid any attention whatsoever to the response provided by the self-petitioner to the Service's Notice of Intent to Deny. Indeed, the officer seems to have become confused with an entirely different case. . . . [T]he self-petitioner has never indicated an interest or desire to change jobs. . . . [T]he officer wrongly claims [that] part of the response was a copy of the self-petitioner's doctoral degree certificate, which is indisputably erroneous . . . since the self-petitioner has not been awarded any doctoral degree.

The record bears out counsel's assertions. The director's very brief discussion of the merits of the petitioner's waiver claim appears to be based on the facts of a different petition entirely.

The above findings warrant the withdrawal of the director's decision, and the remanding of the proceeding for a new decision that more accurately takes into account the evidence of record. At the same time, we note another factor that appears to merit the director's attention and consideration.

Counsel has indicated that a brief would follow within thirty days. **Counsel has since acknowledged,** however, that no brief was ever submitted. Citizenship and Immigration Services records provide a likely explanation for counsel's failure to supplement the appeal. The petitioner filed the appeal on July 22, 2005. Only days later, on July 25, 2005, the director approved another I-140 petition that the petitioner's employer had previously filed – with an approved labor certification – on the alien's behalf. That petition sought to classify the beneficiary as a professional or skilled worker. Its priority date is December 22, 2000, the date that the employer filed Form ETA-750 with the Department of Labor. The approval of the earlier petition may well explain the petitioner's failure to pursue the appeal now under discussion.

If the director issues a request for evidence relating to the present petition, the director may choose to advise the petitioner that a withdrawal of this petition would be without prejudice to any adjustment or visa application proceeding that may arise from the approved petition. The two petitions are separate matters relating to two different immigrant classifications.

In the event that the petitioner chooses to pursue this matter further, the director may, and the Administrative Appeals Office will, take into account the petitioner's approved labor certification when considering the petitioner's waiver request. It is the petitioner's burden to demonstrate that it would be in the national interest to waive the job offer/labor certification requirement that, in this instance, has already been met. Approval of a national interest waiver in this proceeding would not in any way expedite the petitioner's adjustment of status based on the already-approved petition discussed above, and denial of a waiver would not imply ineligibility for the lesser classification under which the employer's petition has already been approved.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.